November 2021

Decision in CPLR Article 78 proceedings - Burr, David (2020-03-11)

At a Special Term of the Albany County Supreme Court, held in and for the County of Albany, in the City of Albany, New York, on the 11th day of March, 2020.

PRESENT: HON. RAYMOND J. ELLIOTT, III
JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
DAVID BURR, #84-B-0365,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

DECISION AND ORDER
INDEX NO. 907626-19

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, ACTING COMMISSIONER and TINA M. STANFORD, CHAIRWOMAN, BOARD OF PAROLE,

Respondents.

APPEARANCES: JOHANNA RAE HUDGENS, Esq.
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Assistant Attorney General
Attorney for the Respondents

RAYMOND J. ELLIOTT, III J.S.C.

Petitioner commenced the instant CPLR article 78 proceeding challenging the final determination of the Board of Parole. Petitioner was convicted of Murder in the Second Degree and Assault in the Second Degree and sentenced to twenty-five years to life, with the possibility of parole. Petitioner now alleges the Board of Parole's determination is illegal and unjust.

Petitioner made his tenth and most recent appearance before the Board of Parole on November 13, 2018. Following an interview and review of Petitioner's institutional record, the Board denied Petitioner's application for parole release. Petitioner administratively appealed the Board's determination on or around May 2, 2019. On July 25, 2019, the Appeal's Unit affirmed the Board's determination. This matter ensued.

The Court begins by noting that parole release determinations are discretionary and will not be set aside so long as the Board complied with the statutory requirements of Executive Law § 259-i (*see Matter of Jones v New York State Bd. of Parole*, 175 AD3d 1652, 1652 [3d Dept 2019]; *Matter of Espinal v New York State Bd. of Parole*, 172 AD3d 1816, 1817 [3d Dept 2019]). In this regard, the Court's role is not to assess whether the Board gave proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record (*see Matter of Hamilton v New York State Div. of Parole*, 119 AD3d 1268, 1271 [3d Dept 2014]; *Matter of Comfort v New York State Div. of Parole*, 68 AD3d 1295, 1295 [3d Dept 2009]).

The Board in its decision stated the following:

> Based on your interview and record, after weighing the statutory and regulatory factors, your release is denied. Your instant offense involved the brutal murder and assault of your victim who you claimed you were scared of and was a criminal in the neighborhood. You stated you take responsibility for his death although you disagree with the medical evidence. The record reflects the victim was beaten and slashed and then marched to a location and dumped in a manhole. You have completed all recommended programs and you are currently a porter. Your improved disciplinary record is noted. Also considered were letters of assurance for housing, your young age when you committed this crime and your sentencing minutes.
> We have reviewed your case plan, your release plans, official letters in support and opposition and your risk and needs assessment which indicates your lower risk and needs. After your interview, the panel remains concerned about your statements concerning law enforcement and continual mistrust of authority. Despite your low risk scores and improved discipline, the panel is concerned that, based on your presentation, you have not developed the tools to live a law abiding life.
> As such this panel is not convinced that you would live and remain at liberty without violating the law. Your release remains incompatible with the welfare of society and would deprecate the heinous nature of these crimes as to undermine respect for the law.

Contrary to Petitioner's contention, the record reveals that the Board considered the relevant statutory factors and followed the appropriate guidelines in denying Petitioner's request for parole release (*see Matter of Rivera v Stanford*, 149 AD3d 1445, 1446 [3d Dept 2017]; *Matter of Diaz v New York State Dept. of Corrections & Community Supervision*, 127 AD3d 1493, 1494 [3d Dept 2015]). The transcript of Petitioner's parole interview demonstrates the Board considered the facts and circumstances of the underlying offense, including Petitioner's youthful status. In addition, attention was paid to other factors such as Petitioner's disciplinary history, educational achievements, programming and community support.

Likewise, the Board had for its review Petitioner's institutional record, which included, among other things, his pre-sentence investigation report, sentencing minutes

and Petitioner's case plan. Petitioner's COMPAS risk assessment evaluation was also available for the Board's review and consideration (*see* Executive Law § 259-c [4]; *Matter of Williams v New York State Div. of Parole*, 114 AD3d 992, 993 [3d Dept 2014]).

The Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (*see Matter of Applewhite v New York State Bd. of Parole*, 167 AD3d 1380, 1381 [3d Dept 2018], *lv dismissed* 32 NY3d 1219 [2019]; *Matter of Beodeker v Stanford*, 164 AD3d 1555, 1556 [3d Dept 2018]). Nor must the Parole Board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i [2] [c] [A] (*see Matter of Mullins v New York State Bd. of Parole*, 136 AD3d 1141, 1142 [3d Dept 2016]; *Matter of Reed v Evans*, 94 AD3d 1323, 1323 [3d Dept 2012]).

Turning to Petitioner's specific contentions, the Court finds these to be without merit. First, Petitioner asserts the Board did not consider Petitioner's age as required by law. In *Matter of Hawkins v New York State Dept. of Corr. & Community Supervision*, the Appellate Division, Third Department considered the mandate of the relevant trilogy of United States Supreme Court decisions (*Graham v Florida*, 560 US 48 [2010]; Miller v Alabama, 567 US 460 [2012]) and *Montgomery v Louisiana*, 577 US ___ [2016]) regarding the right of youthful offenders to a meaningful opportunity for release based upon consideration of the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime (140 AD3d 34, 36-41 [3d Dept 2016]). New York has not adopted a presumption of parole based on the age of the inmate at the time the underlying offense was committed (*compare* Sarah Sloan, Note,

Why Parole Eligibility Isn't Enough: What Roper, Graham, And Miller Mean For Juvenile Offenders And Parole, 47 Colum Human Rights L Rev 243, 243 [2015]). Rather, the proper standard is whether the Parole Board considered Petitioner's "youth at the time of the commission of the crimes and its attendant circumstances" (*Matter of Putland v New York State Dept. of Corr. & Community Supervision*, 158 AD3d 633, 634 [2d Dept 2018]). In so considering, the Board is still free to give greater weight to the seriousness of Petitioner's crimes, despite his youthful status (*see Matter of Allen v Stanford*, 161 AD3d 1503, 1508 [3d Dept 2018], *lv denied* 32 NY3d 903 [2018]).

The Court finds Petitioner's contention, that the Board failed to consider Petitioner's youth, to be without merit. Here, the Board expressly considered Petitioner's age in its determination. During the hearing, Petitioner discussed his age leaving home, his social structure and home life, and his lack of support. Petitioner discussed his relationships at the time as well as how he has come to look upon these events in retrospect. Considering this, the Court cannot find that the Board failed to meet its statutory and Constitutional obligation to consider Petitioner's youth at the time of the offense (*see Matter of Campbell v Stanford*, 173 AD3d 1012, 1016 [2d Dept 2019]; *Matter of Allen v Stanford*, 161 AD3d at 1508; *compare Matter of Rivera v Stanford*, 172 AD3d 872, 876 [2d Dept 2019]; *Matter of Martin v Stanford*, 58 Misc 3d 345, 348 [Sup Ct, Cayuga County 2017, Fandrich, J.]).

Likewise, to the extent that Petitioner asserts that his age at the time of the offense combined with his institutional record and release plans merit immediate release, "[d]iscretionary release on parole shall not be granted merely as a reward for good

conduct or efficient performance of duties while confined" (*Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000]). Even when an inmate's record is considered "extraordinary" and even if the Court were to believe Petitioner to be a "prime candidate for parole release," where the Board does not violate the statutory mandates and its determination does not exhibit irrationality bordering on impropriety, "its discretion is absolute and beyond review in the courts" (*Matter of Hamilton v New York State Div. of Parole*, 119 AD3d at 1274; *see Matter of Mullins v New York State Bd. of Parole*, 136 AD3d at 1142; *Matter of Comfort v New York State Div. of Parole*, 68 AD3d at 1296). The Board is free to weigh the seriousness of Petitioner's crimes more heavily than other factors, thus the Court finds that the Board permissibly partially relied upon the serious nature of the offense committed by Petitioner in denying his discretionary release (*see Matter of McCaskell v Evans*, 108 AD3d 926, 927 [3d Dept 2013]; *Matter of Davidson v Evans*, 104 AD3d 1046, 1046 [3d Dept 2013]; *see generally* Executive Law § 259-i [2] [c] [A] [vii]).

Petitioner also contends that Respondents failed to provide necessary information to prepare for the parole hearing. As part of the administrative appeal, Petitioner contested the failure to turn over the letter regarding the District Attorney's recommendation to deny parole. In the denial of the administrative appeal, the decision contends that the letter was already disclosed and, therefore, the issue was moot. Petitioner denies that he has received the letter and states he "merely knows of its existence." Further, Petitioner contends that the failure to provide the letter necessitates a new hearing.

It is well settled that "the Board is entitled to designate certain parole records as confidential" (*Matter of Wade v Stanford*, 148 AD3d 1487, 1489 [3d Dept 2017]; *see* Public Officers Law § 87 [2] [a], [f]; Executive Law § 259-k [2]; 9 NYCRR 8000.5 [c] [2] [i] [a], [b]). Further, there is no constitutional right to discovery inasmuch as the Board's determination is administrative (*see Matter of Justice v Commissioner of the N.Y. State Dept. of Corr. & Community Supervision*, 130 AD3d 1342, 1343 [3d Dept 2015] [Upholding the denial of confidential information based on petitioner's violent crimes and ongoing mental health issues, among other reasons]).

The parole decision noted "official letters in support and opposition" were considered, however, such letters were not provided to Petitioner. Further, the COMPAS assessment was redacted (specifically questions 24, 29, 30). The Appellate Division, Third Department has "previously recognized that material such as that sought by [P]etitioner—'a written communication between a District Attorney and [the Board] furnishing background information and setting forth factors the writer feels [the Board] should consider in deciding whether to release [P]etitioner on parole' is 'a mere aid to [the Board] in reaching a final decision, [which] fits squarely within the statutory exemption" contained in Public Officer's Law § 87 (2) (g) (iii), and thus not subject to disclosure (*Matter of Grigger v New York State Div. of Parole*, 11 AD3d 850, 852 [3d Dept 2004], *lv denied* 4 NY3d 704 [2005], quoting *Matter of Ramahlo v Bruno*, 273 AD2d 521, 522 [2000], *lv denied* 95 NY2d 767 [2000]; *cf. Matter of Bottom v Fischer*, 129 AD3d 1604, 1605 [4th Dept 2015] [Upholding the partial denial of a FOIL request as related to a letter to the Board from the New York County District Attorney's Office]; *see*

also Matter of Jordan v Hammock, 86 AD2d 725, 725 [3d Dept 1982] [denying access to letters in opposition based on safety and promise of confidentiality], *lv dismissed* 57 NY2d 674 [1982]). The same rationale has been used to justify the redaction of a COMPAS report (*see Matter of Kim v Stanford*, 2015 NY Slip Op 31997 [U], at *1 [Sup Ct, Franklin County 2015, Feldstein, J.]).

Petitioner relies on *Matter of Clark v New York State Board of Parole* (2018 NY Slip Op 30745 [U] [Sup Ct, New York County 2018, Kelley, J.], *mod* 166 AD3d 531 [1st Dept 2018]) for the proposition that records were improperly withheld, thus requiring a new hearing. The issue in *Matter of Clark v New York State Board of Parole* was more broad than here, encompassing letters from "public officials and members of the community" (*Matter of Clark v New York State Board of Parole*, 166 AD3d at 532; *see also Matter of Clark v New York State Board of Parole*, 2018 NY Slip Op 30745 at *3-4 [Noting community opposition included a letter from a "legislative body that sits more than 300 miles away from . . . the place of the crime"]). Notably, in that case, the Petitioner stated that a letter from a District Attorney was not at issue and case law regarding such (*see Matter of Grigger v New York State Div. of Parole*, 11 AD3d at 852) had "no bearing" in that case (Reply brief for Petitioner, available at 2018 WL 2120456). Therefore, the Court finds that *Matter of Clark v New York State Board of Parole* is inapplicable to the current matter.

Contrary to Petitioner's contention that he only knows the letter exists, during his interview with the Board, Petitioner expressed specific knowledge of the letter and stated his concern with both the fact that the letter was written by a subsequent Assistant

District Attorney instead of the District Attorney who prosecuted him as well as objected that the letter mentioned community opposition [Petitioner's Exhibit 2 Pg. 29-30]. Contrary to Petitioner's contention that unspecified community opposition should not be considered, "unspecified 'consistent community opposition' to . . . parole release . . . may be taken into account in rendering a parole release determination" (*Matter of Applewhite v New York State Bd. of Parole*, 167 AD3d at 1381). Further, nothing in the statute prevents consideration of a letter from a subsequent official in the District Attorney's office, as the role is to provide background information and set forth factors the writer feels the Board should consider in deciding whether to release Petitioner on parole and acts merely as a preliminary aid to the Board in reaching a final decision (*see generally* Executive Law § 259-i [2] [ii] [c] [A] [vii]; *Matter of Grigger v New York State Div. of Parole*, 11 AD3d at 852; *Matter of Ramahlo v Bruno*, 273 AD2d at 522).

Similarly, the Court finds that a COMPAS report may be redacted as the regulation specifically allows for the Board to withhold "diagnostic opinions which, if known to the inmate/releasee, could lead to a serious disruption of his institutional program or supervision" (9 NYCRR § 8000.5 [c] [2] [i] [a] [1]; *see also Matter of Kim v Stanford*, 2015 NY Slip Op 31997 [U], at *1; *see generally Matter of Wade v Stanford*, 148 AD3d at 1489).

Next, Petitioner claims Respondents failed to explain and properly consider his COMPAS risk assessment. It is now well established that a risk and needs assessment instrument must be utilized in connection with parole release determinations made after September 30, 2011 (*see Matter of Linares v Evans*, 112 AD3d 1056, [3d Dept 2013]).

The risk and needs principals that must be incorporated pursuant to Executive Law § 259-c [4], while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that individual would succeed if released to parole supervision, serve only to "assist members of the Board in determining which inmates may be released to parole supervision" (Executive Law § 259-c [4]). Thus, while the Board must consider the risk assessment tool, it is not bound by its results as part of its discretionary authority in rendering such determinations (*see Matter of Rivera v New York State Div. of Parole*, 119 AD3d 1107, 1109 [3d Dept 2014]; *Matter of Partee v Evans*, 117 AD3d 1258, 1259 [3d Dept 2014], *lv denied* 24 NY3d 901 [2014]).

Here, it is clear the Board considered the COMPAS risk assessment instrument developed for Petitioner. The instrument denotes that Petitioner presents as a low risk for felony violence, arrest, and absconding. However, the Board is free to weigh other factors and here cited in its determination the seriousness of the instant offense as well as other considerations (*see Matter of Applewhite v New York State Bd. of Parole*, 167 AD3d at 1381; *Matter of Hamilton v New York State Div. of Parole*, 119 AD3d at 1271).

Petitioner further contends that the Board inappropriately considered Petitioner's alleged mistrust of authority and irrationally misconstrued his statements.

Petitioner admitted that he stuck the victim with a table leg and then banged the victim's head into a radiator before stabbing him in the leg, requiring a tourniquet to stop the bleeding. Petitioner then proceeded to seek to minimize these acts. He stated "I was not a very physical, powerful individual. The thump with the table leg was nothing visible. The bang into the radiator was nothing that caused any damage, any injury that

was visible. The puncture like I stated, in the leg was only a quarter inch" [Petitioner's Exhibit 2, Pg 16].

Petitioner further admitted to stabbing the victim but again sought to minimize accountability by stating "[t]he throat was [sic] never cut according to the autopsy doctor, the medical examiner. There was three linear lines like paper cuts. across his throat. Again, I was not a strong individual. I was a weak individual myself and his throat was never cut. I mean, I'm sure. the individual was harmed with the blade, with a knife, with a weapon. I had assaulted him. It led not to his death" [Petitioner's Exhibit 2, Pg 17]. At the same time, Petitioner described his actions as "reliving" his father's experience in the Korean War and further stated "I ran the knife across the individual's throat three times, thinking in my mind, this is how dad did, this is how you exterminate or eliminate a human being, and I acted that out" [Petitioner's Exhibit 2, Pg 18]. The second statement, given moments after the first, is hardly consistent with "paper cuts" as Petitioner first described the wounds. He then further described the dozens of stab wounds as "all the stabbing, all superficial injuries. There was no one of them life threatening. They were like pin pricks" [Petitioner's Exhibit 2, Pg 18].

Petitioner also described the victim's lack of resistance as "it was like when -you know you're wrong and you know you're wrong [sic] and you concede. It's over with. Okay, I did wrong. It's done. Whatever happens, happens. I got to live with it" [Petitioner's Exhibit 2, Pg 19].

Petitioner likewise described his accomplice as being the real killer and being "protected" by the police because his mother was a police crossing guard [Petitioner's

Exhibit 2, Pg 19, 22]. To this effect, Petitioner stated, "To this day, I will go to my burial grounds knowing that I never strangled this individual with my bare hands. I'm not guilty of murder in the second degree by causing the individual's death under our judicial system and under our medical science in this world. But I will take responsibility, because I was there" [Petitioner's Exhibit 2, Pg 19, 22].

When discussing Petitioner's disciplinary record, Petitioner objected to the consideration of his misconduct. Despite the Board initially attempting to focus on the improvement in Petitioner's disciplinary record, Petitioner himself stated that "it's not--that it hasn't improved, I have been totally abused since I've been incarcerated" [Petitioner's Exhibit 2, Pg 25]. Petitioner proceeded to state that employees had been "assaulting [him], harassing [him], threatening [him]" [Petitioner's Exhibit 2, Pg 25]. He further stated that "I have been defending myself since I came in the system at 17 years old from the wanton abuse by staff members. And it's not that I've done wrong. It's just that staff have an authority figure. They can say what they want when they want, write the misbehavior reports and penalize me and they have done that" [Petitioner's Exhibit 2, Pg 25]. Petitioner stated that "when you have a tin shield, when you have a shield, you become a government official, you become a peace officer, you know people are doing wrong and harming people or moving illegal drugs and causing violence, I tried when I was child to defend this country and my way of life and my family and my neighborhood from these violent drug addicted people who were hurt other people stealing property. So staff have these shields. They can [do] this. They're peace officers. But they want and come and use me and I refused to be released at 25 years because I didn't want to work

with these type of people that were corrupt. So my whole disciplinary record is not bad at all" [Petitioner's Exhibit 2, Pg 26-27].

"[C]redibility determinations are generally to be made by the Board" (*Matter of Siao-Pao v Dennison*, 51 AD3d 105, 108 [1st Dept 2008], *affd* 11 NY3d 777 [2008]). The Board may properly consider "attempts to minimize [Petitioner's] responsibility" (*Matter of Rhoden v New York State Div. of Parole*, 270 AD2d 550, 551, [3d Dept 2000], *lv dismissed* 95 NY2d 898 [2000]). The Board may consider Petitioner's "remorse, his acceptance of responsibility and insight into the crimes" (*Matter of Payne v Stanford*, 173 AD3d 1577, 1578 [3d Dept 2019]). Further, an inmate's continuing failure to acknowledge responsibility for his conduct, including failing to take responsibility for prison discipline issues raises "a plausible concern as to whether he has made any progress towards rehabilitation" (*Matter of Molinar v New York State Div. of Parole*, 119 AD3d 1214, 1215–1216 [3d Dept 2014]). "[R]emorse and insight into the offense following . . . are not enumerated in the statute. However, the Board is empowered to deny parole where it concludes that release is incompatible with the welfare of society. Thus, there is a strong rehabilitative component in the statute that may be given effect by considering remorse and insight" (*Silmon v Travis*, 95 NY2d at 477).

Since it is the Board's role to assess the credibility of Petitioner and since consideration regarding Petitioner's minimizing of responsibility, both regarding the initial offense and his continuing disciplinary issues, is permissible, the Board's characterization of these considerations as being "concerned about your statements concerning law enforcement and continual mistrust of authority" does not constitute

"irrationality bordering on impropriety" (*Silmon v Travis*, 95 NY2d at 476 [internal quotation marks and citations omitted]).

Petitioner's contention that the Board's denial is an illegal resentencing is without merit. The Court would note that Petitioner was sentenced to an indeterminate term of incarceration with the minimum term being 25 years. The Board is vested with the discretion to determine when release is appropriate during Petitioner's sentence notwithstanding the fact that it is beyond the minimum term pronounced by the sentencing court (*see Matter of Cody v Dennison*, 33 AD3d 1141, 1142 [3d Dept 2006], *lv denied* 8 NY3d 802 [2007]).

Petitioner contends that the "deprecate the seriousness of his crime" standard is unconstitutionally vague. The Court finds this argument has been raised and rejected by other courts and is without merit for the reasons previously established in those decisions (*see e.g. MacKenzie v Cunningham*, 2014 US Dist LEXIS 135558, at *26 [SDNY. Apr. 23, 2014]; *West v Alexander*, 2009 US Dist LEXIS 121294, at *10 [EDNY Dec. 28, 2009]).

Based upon the foregoing, the Court finds that the Board's decision in this case does not exhibit "'irrationality bordering on impropriety'" (*Silmon v Travis*, 95 NY2d at 476, quoting *Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77 [1980]; *see Matter of Campbell v Stanford*, 173 AD3d at 1016; *Matter of Allen v Stanford*, 161 AD3d at 1508). Therefore, judicial interference is unwarranted. Any remaining arguments have been examined and found to be without merit or need not be considered in light of this determination.

Accordingly, the petition is hereby **denied** and **dismissed.**

This shall constitute the Decision, Order and Judgment of the Court. The Court has uploaded the original Decision/Order to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the Office of the Albany County Clerk.

Counsel for Respondents is not relieved from the applicable provisions of CPLR 2220 and 202.5 b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

202.5b (b) (2) (I) of the Uniform Rules of Supreme and County Courts directs that service upon nonparticipating parties must be made in hard copy.

Concurrent with the uploading of this Decision/Order to the NYSCEF website, a copy of the document is also being mailed to parties to the action/proceeding. All original supporting documentation is being filed with the Albany County Clerk's Office.

SO ORDERED AND ADJUDGED

ENTER.

Dated: March 11, 2020
Albany, New York

RAYMOND J. ELLIOTT, III
Supreme Court Justice

Papers Considered:

03/12/2020

The following e-filed documents, listed by NYSCEF document number 1-43, including:

1. Notice of Petition filed on November 2, 2019; Verified Petition filed November 2, 2019; Annexed Exhibits 1 -19.

2. Respondents' Answer filed January 10, 2020; Annexed Exhibits A- L; Memorandum of Law in Opposition filed January 10, 2020.

3. Memorandum of Law in Reply filed January 16, 2020.